U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 28Mar2002

Case No. 2000-LHC-2478
2000-LHC-2479

OWCP No. 5-48321
5-51578

In the Matter of

JAMES M. KEPHART,
Claimant
v.

NORFOLK SHIPBUILDING AND DRY DOCK CORPORATION,
Employer

RICHARD-FLAGSHIP SERVICES, INC.,
Carrier

Appearances:
Ralph Rabinowitz, Esq., for Claimant
Gerard E. W. Voyer, Esq., for Employer

Before:
RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

This proceeding involves a claim for disability from an injury alleged to have been suffered by Claimant, James M. Kephart, covered by the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 948(a). (Hereinafter "the Act"). Claimant alleges that he was injured when a steel gang box lid closed on his head and neck while employed by Employer; and that as a result he is suffering from a cervical injury.

The claim was referred by the Director, Office of Workers' Compensation Programs to the Office of Administrative Law Judges for a formal hearing in accordance with the Act and the regulations issued thereunder. The formal hearing was held before the undersigned Administrative Law Judge on December 13, 2000, in Newport News, Virginia (TR at 1).[1] The issues at the formal hearing were:

[1] EX - Employer's exhibit; CX- Claimant's exhibit; TR - Transcript of December 13, 2000 hearing; Jx - Joint exhibit

medical benefits, temporary total disability from October 16, 1998 through January 17, 2000, and permanent partial disability from January 17, 2000 to the present and continuing. Employer submitted forty-eight exhibits, EX-1- EX 48, which were admitted without objection. (*Id* at 32). Claimant submitted twenty-five exhibits, CX-1- CX-25, which were admitted without objection. (*Id* at 31.) The record was held open for 60 days for briefs. On December 12, 2000, Employer requested leave to submit the deposition of Barbara Byers, Rehabilitation Counselor, post hearing. No objections were filed to the request, and the deposition is admitted into the record as EX 49.

By letter dated February 23, 2001, Counsel for the Employer submitted stipulations of facts between the Claimant and Employer regarding the issue of medical expenses for treatment provided by Dr. Bernard Miller and Dr. R. Kotzen and other medical expenses incurred prior to December 13, 2000. These stipulations are admitted as Joint Exhibit 1 (JX 1).

Following requests for extensions of time for briefs, Claimant submitted a post-hearing brief on May 7, 2001, and Employer submitted a post-hearing brief on May 8, 2001.

The findings and conclusions which follow are based on a complete review of the record in light of the argument of the parties, applicable statutory provisions, regulations, and pertinent precedent.

Issues

The issues in dispute at the hearing included:

1. Whether the harm Claimant suffered was caused by the 1983 and/or the 1984 accidents;

2. Whether Claimant was temporarily and totally disabled from October 16, 1998 through January 17, 2000, and permanently and partially disabled from January 17, 2000 to the present and continuing;

3. Whether Claimant's average weekly wage should be determined as of the date of the injury or as of the date the disability manifested.

Stipulations

Employer and Claimant stipulated and I find (Jx1):

1. That the Longshore and Harbor Workers' Compensation Act (33 U.S.C. §901, et seq.), hereinafter "the Act", applies to this claim. *See also,* TR 32.

2. That on April 10, 1983, the employee was in the employ of the employer and that liability of the employer for payment of workers' compensation benefits was self-insured.

3. That a formal hearing was held on December 13, 2000 on the employee's claim for additional compensation benefits and for payment of certain medical expenses for medical treatment provided by and/or at the direction of Dr. Bernard H. Miller, and/or by and/or at the direction of Dr. R. Kotzen, and/or for any and all medical expenses incurred prior to December 13, 2000.

4. That the employer has controverted the claim for additional compensation benefits and for payment of medical expenses for medical treatment provided by and/or at the direction of Dr. Bernard H. Miller, and/or by and/or at the direction of Dr. R. Kotzen, and/or for any and all medical expenses incurred prior to December 13, 2000.

5. That the employee and the employer have agreed to a compensation resolution of all claims for medical expenses incurred prior to December 13, 2000, the date of the formal hearing held in this case whereby the employer agrees to pay and the employee agrees to accept the sum of $400.00 in return for which agreement and stipulations the employer is to be released and discharged from any and all liability for medical expenses incurred by and/or at the direction of Bernard H. Miller, and/or by and/or at the direction of Dr. R. Kotzen, and/or for any and all medical expenses incurred prior to December 13, 2000.[2]

Additionally, on the record of the formal hearing, the parties stipulated that:

6. That the Claimant sustained an injury arising out of and in the course of his employment on April 10, 1983. (Employer brief at 1).

7. That the Claimant sustained an injury arising out of and in the course of his employment on July 2, 1984. (Employer brief at 1).

8. That the Claimant*s average weekly wage at the time of the accident/injury of April 10, 1983 was $382.43 resulting in a compensation rate of $254.97. (TR 15, 17);

9. That the Claimant*s average weekly wage at the time of the accident and injury of July 2, 1984 was $571.88 resulting in a compensation rate of $381.27. (TR 15, 17);

10. That the claimant reached maximum medical improvement on December 3, 1999, based upon the opinion of Dr. Kotzen, and did not suffer any further disability after that date. (TR 18, 28).

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[2] The stipulation appears on its face to violate § 915(b) of the Act as it reads as if the parties are compromising the amount of medical expenses to be paid without presenting an application for settlement under § 8(i). However, the stipulation is accepted because the parties have also agreed that the remainder of Claimant's medical expenses have been covered by private insurance. Therefore, the Claimant has not accepted less compensation than he might have been entitled to, and § 915(b) is not violated.

11. The Claimant has successfully invoked the presumption of § 20, that his injury is the result of an accident at work. (TR 26).

DISCUSSION OF LAW AND FACTS

Causation

Section 20(a) of the Act provides claimant with a presumption that his condition is causally related to his employment if he shows that he suffered a harm and that employment conditions existed or a work accident occurred which could have caused, aggravated, or accelerated the condition. *See Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991); *Gencarelle v. General Dynamics Corp.*, 22 BRBS 170 (1989), *aff'd*, 892 F.2d 173, 23 BRBS 13 (CRT)(2d Cir. 1989). Once claimant has invoked the presumption, the burden of proof shifts to employer to rebut it with substantial countervailing evidence. *Merrill*, 25 BRBS at 144. If the presumption is rebutted, the administrative law judge must weigh all the evidence and render a decision supported by substantial evidence. *See Del Vecchio v. Bowers*, 196 U.S. 280 (1935).

To establish a *prima facie* claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that (1) the claimant sustained physical harm or pain; and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128 (1984). Once this *prima facie* case is established, a presumption is created under § 20(a) that the employee's injury or death arose out of employment.

In this case, the Employer stipulated at the hearing that Claimant had shown his *prima facie* case. (TR at 26.) Employer was asked, "does the employer contest that the presumption is invoked in the first place?" (*Id*.) Employer replied, "No, I think obviously he had an injury. I think the evidence is there to establish the prima facie case. ...so, no, I'm not going to argue that you would not have sufficient basis to find the Section 20 presumption that a prima facie case has been established and that a Section 20 presumption arises." (TR at 26-27.) As Employer agrees that Claimant has shown his *prima facie* case, it will be presumed that Claimant's injury is covered by the Act.

The burden now shifts to the employer to rebut the presumption with substantial countervailing evidence which establishes that the claimant's employment did not cause, contribute to or aggravate his condition. *James v. Pate Stevedoring Co.*, 22 BRBS 271 (1989); *Peterson v. General Dynamics Corp.*, 25 BRBS 71 (1991). "Substantial evidence" means evidence that reasonable minds might accept as adequate to support a conclusion. *E & L Transport Co., v. N.L.R.B.*, 85 F.3d 1258 (7th Cir. 1996). Employer must produce facts, not speculation, to overcome the presumption of compensability. Reliance on mere hypothetical probabilities in rejecting a claim is contrary to the presumption created by § 20(a). *See Smith v. Sealand Terminal*, 14 BRBS 844 (1982). Rather, the presumption must be rebutted with specific and comprehensive medical evidence proving the absence of, or severing, the connection between the harm and employment. *Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141, 144 (1990).

Employer argues that it has submitted all elements necessary to rebut the § 20(a) presumption. Employer contends that the evidence of Dr. Meade and Dr. Troiano establish that Claimant did not have a cervical radiculopathy or a herniated cervical disc following the 1983 injury. (Employer's Brief at 9.) Employer states that Dr. Meade even returned Claimant to full, unrestricted duty. (*Id*.) Employer also states that the evidence of Dr. Nichols, Dr. Troiano, Dr. Foer, and Dr. Rashti also fail to indicate any cervical radiculopathy, herniated cervical disc, or any of the noted findings by Dr. Kotzen following the 1984 injury. (*Id*.) Employer argues that the Board has found that a combination of medical testimony, a credibility determination and negative evidence constituted sufficient evidence to rebut the presumption of causation. (Employer's brief at 9, citing *Craig v. Maher Terminal*, 11 BRBS 400 (1979).)

The evidence shows that, on September 13, 1983, Dr. Thomas S. Meade[3] examined Claimant for intermittent pain in the neck and posterior shoulder regions that Claimant had been experiencing since April, 1983. (EX 23.) Claimant denied that he experienced any of these symptoms before his injury. (*Id*.) After a physical exam, Dr. Meade's impression was that Claimant had persistent cervical neck discomfort, probably on the basis of degenerative disc disease which pre-existed his injury, but was aggravated by his injury. (*Id.*)

On February 28, 1984, Dr. Meade again examined Claimant for continued pain in his neck across both shoulders with persistent headaches which interrupt his sleep and some intermittent pain in the right anterior elbow region for the past two weeks. (EX 22.) Dr. Meade's impression was that Claimant continued to have some persistent neck symptoms which he felt might be related to cervical disc disease. (*Id*.)

At some point, Dr. Meade referred Claimant to Dr. Raymond G. Troiano [4], a neurologist. (EX 20.) A letter from Dr. Troiano to Dr. Meade states that Dr. Troiano saw Claimant in his office on consultation from his injury in April, 1983. (EX 20.1.) Since his injury, Claimant had been bothered with tightness, soreness, and pain in his neck radiating down into both shoulders and trapezius areas and up into the occipital area of his head and was associated with severe headache. (*Id*.) Dr. Troiano did not find any objective evidence for a cervical radiculopathy or herniated cervical disc, but he did indicate that he thought Claimant was suffering from chronic cervical strain.

An electromyography report, performed on March 7, 1984, states that the study showed no electrical evidence for motor radiculopathy, plexopathy, or neuropathy effecting the cervical spine or the nerve roots going to the right side. The left side was not studied because of the normalcy of the right side. (EX 19.)

On April 4, 1984, Dr. Meade's notes state that Claimant continued to have discomfort in his

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[3] Dr. Meade is board certified in orthopaedic surgery. American Board of Medical Specialties, *Who's Certified*, <http://www.abms.org/newsearch.asp>.

[4] Dr. Troiano is certified in neurology. American Board of Medical Specialties, *Who's Certified,* <http://www.abms.org/newsearch.asp>.

neck, discomfort and stiffness in the anterior aspect of his right elbow. (EX 18.) Dr. Meade again stated that Claimant had evidence of some cervical disc disease, although there were no neurological findings on this testing, and he thought Claimant had a cervical strain. (*Id*.)

Claimant's second injury occurred on July 2, 1984 when a steel plate slipped out of its clamps and struck Claimant on the left upper shoulder area. (EX 17.)

Dr. Glenn Nichols [5] examined Claimant on July 10, 1984 for pain in Claimant's left trapezius area since the injury. (EX 17.) Dr. Nichols's impression was that Claimant had a contusion with a spasm of the left trapezius and he did not anticipate any permanent disability from this injury, although Dr. Nichols stated that the length of time of recovery of these types of injuries was quite variable. (*Id*.)

Dr. Nichols saw Claimant again on July 16, 1984 and found that the spasm in Claimant's trapezius had improved. (EX 16.) The echymosis had resolved and Claimant now had a full range of motion in his neck and upper extremities. Dr. Nichols thought he could return to work on July 18, 1984 and gradually restart into heavy activities. (EX 16.)

On November 20, 1986, Dr. Troiano examined Claimant because Claimant had begun to have weakness in his left arm, numbness of his hand, and continued neck pain and posterior headaches, episodes of shortness of breath, a tightness in his chest, tingling in his hands and numbness on his face around his mouth. (EX 13.) Dr. Troiano stated that a CT scan of the spine showed a spondylolysis at C4-5 with a posterior spur off to the left, obliterating the lateral recess on the left and it appeared that it was impinging on the area of the C-5 nerve root foramina as well. (*Id*.) His note indicated that, because of the CT scan and the clinical symptoms, he was concerned that Claimant had a cervical radiculopathy, although there was a "functional overlay in the form of giveaway weakness." (EX 14.2.) Dr. Troiano also thought hyperventilation played a part in the symptoms as well. (*Id.*)

An EMG, dated November 26, 1986 and performed by Dr. Troiano, states that the study was probably within normal limits with no definite electrical evidence for a motor radiculopathy effecting the left upper extremity. (EX 12.)

On February 18, 1988, Dr. Troiano again saw Claimant for memory problems, which Claimant stated he had had since the accident, and which Claimant had mentioned to Dr. Meade, but not Dr. Troiano. (EX 8.1.) Dr. Troiano stated that a CT scan and MRI suggested a bony spur that could be causing a radiculopathy, although neurosurgery and orthopaedic evaluations had not recommended surgery. (*Id*.) Claimant's symptoms had gotten progressively worse and were associated with an inattentiveness that was exacerbated when he felt pain in his neck and shoulders, some depression and shortness of temper over the years. (*Id.*)

Dr. Troiano stated that Claimant appeared to be depressed with some psychomotor retardation

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[5] Dr. Nichols is board certified in orthopaedic surgery. American Board of Medical Specialties, *Who's Certified,* <http://www.abms.org/newsearch.asp>.

and tenseness, which he said was quite common for people to develop after injuries which result in chronic pain syndrome and that the depression would produce new neurological symptoms in the form of complaints of intellectual decline and personality change. (EX 8.2.) He thought Claimant needed a full neurological work-up to rule out any structural or metabolic reasons for the intellectual decline. (EX 8.2.)

On March 17, 1988, Dr. Troiano stated Claimant's CT scan was normal and all his blood tests were normal. (EX 6.) A full battery of neuropsychological tests revealed no evidence for neurologic impairment and the impression was the Claimant had a atypical depression with a dysphoric mood disorder producing his complaints of mental impairment and personality change. (*Id*.) Dr. Troiano stated that this correlated with his chronic pain syndrome. (*Id*.) Dr. Troiano recommended that Claimant needed continued psychological evaluation and treatment for this and that he might benefit from an anti-depressant. Claimant stated that he had taken an anti-depressant for a month previously but did not think it helped. (EX 6.) Dr. Troiano stated that he told Claimant to continue with psychological evaluations with Dr. Thomas Kupke and Dr. Troiano released Claimant from treatment. (EX 6.)

On January 4, 1990, Dr. Robert Rashti,[6] a neurologist, examined Claimant because of headaches, cervical stiffness, tightness across the shoulders, loss of peripheral vision, and intermittent nausea, which Claimant related to a work injury in April, 1983. (EX 5.1.) Following another injury a year later, Claimant stated that he began to experience soreness and stiffness in his shoulders and intermittent disorientation and occasional numbness in his hands and feet. (Id.)
It was Dr. Rashti's impression that Claimant was suffering from an underlying depression and that his symptom complexes have no bearing on his previous injuries. Dr. Rashti elected to put him on a course of Doxepin and if there was no significant response, he would recommend a referral for formal psychiatric evaluation for depression. (Id.)

On January 25, 1990, Dr. Rashti saw Claimant again for a follow-up neurological evaluation. (EX 4.1.) Dr. Rashti felt that Claimant was experiencing multiple subjective complaints due to an underlying functional basis. Dr. Rashti was comfortable that a neurosurgical basis had been excluded. Dr. Rashti felt that the degenerative changes found in the cervical spine were incidental and not consistent with the clinical symptoms Claimant showed. (*Id*.) Dr. Rashti stated that there are no surgical problems he could help. He did not approach the topic of psychological counseling or psychiatric counseling, but thought that this was where the ideology of Claimant's symptoms were.

The office notes of Dr. Peter Klara [7], a neurosurgeon, dated January 9, 1995, state that Claimant had been experiencing significant memory difficulties, which Dr. Klara felt sounded like a dysnomia where Claimant has difficulty naming familiar objects. (EX 3.1.) Claimant related one

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[6] Dr. Rashti is board certified in neurological surgery. American Board of Medical Specialties, *Who's Certified*, <http://www.abms.org/newsearch.asp>.

[7] Dr. Klara is board certified in neurological surgery. American Board of Medical Specialties, *Who's Certified*, <http://www.abms.org/newsearch.asp>.

incident where he had difficulty remembering how to get to work. (*Id*.) After a physical exam, Dr. Klara diagnosed cervical spondylolysis by history, cervicalgia, and chronic neck and shoulder pain. (EX 3.3.) Dr. Klara thought Claimant was at maximum medical benefit and could return to duty as a ship fitter with the restriction of no overhead grinding. (*Id*.) Dr. Klara thought Claimant's complaints of perioral numbness associated with memory loss were disconcerting and told Claimant that if the symptoms persisted or progressed that further evaluation would be necessary. He did not think, however, that in the absence of any demonstrable neurologic deficit further neuro-diagnostic testing should be pursued. (*Id*.)

Employer argues that it has provided substantial evidence to rebut the presumption, and that the presumption may be rebutted by negative evidence if it is specific and comprehensive enough to sever the potential connection between the particular injury and the job-related accident. (Employer's brief at 9, 10, *citing Swinton v. J. Frank Kelly, Inc*., 554 F.2d 1075, 10083 (D.C. Cir), cert. denied, 429 U.S. 820 (1976). Here, Employer contends, all elements necessary to rebut the presumption have been met. (*Id.*)

However, I find that the presumption has not been rebutted. Employer bears the burden to rebut the presumption that Claimant's injuries are caused by his work accidents with specific and comprehensive medical evidence proving the absence of, or severing, the connection between the harm and employment. Dr. Meade diagnosed Claimant with degenerative disc disease that had been aggravated by his 1983 injury. Later, Dr. Meade stated that Claimant's persistent neck symptoms were related to cervical disc disease. Dr. Troiano also thought Claimant's problems were related to cervical neck strain in 1984. In 1986, after the second injury, Dr. Troiano found spondylolysis at C4-5 and a posterior spur off to the left, and was concerned about cervical radiculopathy. In 1988, Dr. Troiano also stated that, after injuries resulting in chronic pain syndrome, like Claimant's, depression would produce new neurological symptoms.

The only physician who stated that Claimant's complaints were not related in some way to his previous injury was Dr. Rashti. Dr. Rashti thought, like Dr, Troiano, that depression caused Claimant's symptoms, but Dr. Rashti stated that the symptom complexes had no bearing on his previous injuries. To the contrary, Dr. Troiano stated that the depression was linked to Claimant's chronic pain syndrome.

In considering the opinion of Dr. Rashti, I note that he only saw Claimant twice in 1990 and couches his opinion as his "impressions." Dr. Rashti's opinion is otherwise unexplained, except to conclude that since Claimant's complaints were subjective, they were not related to his work injuries. Moreover, Dr. Rashti's opinion does not address the cause of Claimant's chronic pain, and as such cannot sever the presumptive link of causation from his work accidents.

Therefore, I find that Employer has not presented evidence that a reasonable person would find as sufficient to sever the connection between Claimant's work accidents and his injuries. As such, Employer has failed to rebut the presumption of § 20. Therefore, I find that the Claimant's injuries are compensable under the Act.

Temporary Total Disability

Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). The permanency of any disability is a medical rather than an economic concept. Disability is defined under the Act as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Permanent disability is a disability that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649, *pet. for reh'g denied sub nom. Young & Co. v. Shea*, 404 F.2d 1059 (5th Cir. 1968)(per curium), *cert. denied*, 394 U.S. 876 (1969). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56, 60 (1985). Any disability suffered by Claimant before reaching maximum medical improvement is considered temporary in nature. *Berkstresser v. Washington Metropolitan Area Transit Authority*, 16 BRBS 231 (1984).

The date of maximum medical improvement is a question of fact based upon the medical evidence of record and is not dependant on economic factors. *Louisiana Insurance Guaranty Assoc. v. Abbott*, 40 F.3d 122 (5th Cir. 1994); *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184, 186 (1988); *Williams v. General Dynamics Corp.*, 10 BRBS 915 (1979). An employee reaches maximum medical improvement when his condition becomes stabilized. *Cherry v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 857 (1978); *Thompson v. Quinton Enterprises, Limited*, 14 BRBS 395, 401 (1981).

The parties have stipulated that Claimant reached maximum medical improvement as of December 3, 1999, based upon the opinion of Dr. Kotzen. Dr. Kotzen stated in his office notes on that day, "The patient will be cleared from the office and also cleared to return to normal activities of daily life without restrictions." (CX 13.1.) The parties also stipulated that, "there is no degree of medical or physical impairment after December 3, 1999." (TR at 28.) Based upon the stipulation, supported by substantial evidence, I find that December 3, 1999 is the date of maximum medical improvement. Therefore, any disability suffered by the Claimant prior to December 3, 1999 must be considered temporary. As the parties have agreed that Claimant suffered no medical or physical impairment after December 3, 1999, there is no residual disability after the date of maximum medical improvement.

The question of extent of disability is an economic as well as a medical concept. *Quick v. Martin*, 397 F.2d 644 (D.C. Cir. 1968); *Eastern S.S. Lines v. Monahan*, 110 F.2d 840 (1st Cir. 1940); *Rinaldi v. General Dynamics Corporation*, 25 BRBS 128, 131 (1991). To establish a *prima facie* case of total disability, the claimant must show that he is unable to return to his regular or usual employment due to her work-related injury. *Elliott v. C & P Telephone Co.*, 16 BRBS 89 (1984); *Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339 (1988). A claimant's credible testimony alone, without objective medical evidence, on the issue of the existence of disability may constitute a sufficient basis for an award of compensation. *Ruiz v. Universal Maritime Service Corp.*, 8 BRBS 451, 454 (1978); *Eller & Co. v. Golden*, 620 F.2d 71, 12 BRBS 348 (5th Cir. 1980). In addition,

claimant's credible testimony of the constant pain endured while performing work activity may constitute a sufficient basis for an award of compensation notwithstanding considerable evidence that claimant can perform certain types of work activity. *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78, (5th Cir. k1991). When the facts support a finding in favor of either party, the choice between reasonable inferences is left to the administrative law judge and may not be disturbed if it is supported by the evidence. *Id.* at 945, 81. The burden of proving the nature and extent of disability rests with Claimant. *Trask v. Lockheed Shipbuilding Construction Co.*, 17 BRBS 56, 59 (1980).

In this case, Claimant has shown that he could not return to his former work as a shipfitter due to his work-related injury as of May 7, 1999. Although Claimant testified at the hearing that he did not believe that he could return to work at the shipyard "doing the same trade I did previously," as of October 16, 1998, when Claimant was laid off, (TR at 55), I do not find this evidence to be credible in determining that Claimant could not return to work due to his injury. Claimant had been performing the job for 14 years after the last injury in 1984 and nothing in the record indicates that anything happened to change his physical ability to perform the job.

It is undisputed that Claimant could not return to his position as a shipfitter, as the Claimant was laid off due to an economic layoff on October 16, 1998. Claimant testified that

> there were lots of rumors about the yard, about what was going to happen, that the yard had been sold. That was in the newspaper. The night shift was assembled together in a separate building and informed that there were going to be major changes. Again, rumor was that half the yard was going to be closed and it was hard to believe that all that was true, but yes, sir, the layoffs began immediately at the– from the time they said there was going to be changes, the layoffs began immediately.

(TR at 50-51.)

Claimant admitted that he was not singled out for layoff, that the layoff was immediately following Southwest Marine's purchase of Norfolk Shipbuilding and Drydock company, and that he was laid off in order of his seniority. (TR at 56.) As there is no evidence that Claimant was laid off due to his work restrictions or his disability, I find Claimant's testimony that he could not return to his former employment will not satisfy his burden of showing that he could not return to his former employment.

However, Claimant can establish that he could not return to his usual employment as of May 7, 1999. Dr. Kotzen's medical records on that date indicate that Claimant had cervical spondylosis with herniated disc and osteophytes compressing the spinal cord at C4-5 and C5-6. (CX 13.18-2.) Dr. Kotzen stated

> I instructed Claimant that the danger to him would be complete paralysis should he have any untoward complications such as a fall or a sneeze or anything that would remotely affect the herniated disc at C4-5. He understands this risk and says that he does have a soft foam

cervical collar which he uses periodically. I told him that this would be very important and that he should drive very carefully and in general refrain from any strenuous activity whatsoever. I told him not to lift heavy things or push or pull heavy things or use any leverage type movements such as lifting heavy objects off his shoulders or lower than up to level of his shoulders. He understands these instructions and will abide by them as best he can. I have told him that the risk of severe spinal cord injury is very high and that he should be as careful as he possibly can. (EX 13.18-3.)

Although Dr. Kotzen did not state in so many words that Claimant could not return to his job as a shipfitter, such can be reasonably inferred from Dr. Kotzen's warning that "the danger to him would be complete paralysis should he have any untoward complications such as a fall or a sneeze or anything that would remotely affect the herniated disc at C4-5." Moreover, when these restrictions are compared to the duties described in the Dictionary of Occupational Titles (DOT) [8], it becomes clear that Claimant could not return to his former employment due to his work-related injury.

In addition, Dr. Kotzen does not indicate that Claimant can return to any employment until December 3, 1999, when he removes restriction completely and the parties stipulate that Claimant suffers no physical or medical restriction. (CX 13.1.) After December 3, 1999, however, there is no evidence that Claimant could not return to his usual employment due to his injury. Therefore, I find that Claimant is temporarily and totally disabled from May 7, 1999 until December 3, 1999. On December 3, 1999, Claimant is no longer disabled in any way and can return to his previous employment.

Average Weekly Wage

For the purposes of § 10 and the determination of the employee's average weekly wage with respect to a claim for compensation for death or disability due to an occupational disability, the time of injury is the date on which the employee or claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the death or disability. *Todd Shipyards Corp. v. Black*, 717 F.2d 1280 (9th Cir. 1983); *Hoey v. General Dynamics Corp.*, 17 BRBS 229 (1985); *Pitts v. Bethlehem Steel*

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[8] **806.381-046 SHIPFITTER (ship-boat mfg.) alternate titles: fitter**

Lays out and fabricates metal structural parts, such as plates, bulkheads, and frames, and braces them in position within hull of ship for riveting or welding: Lays out position of parts on metal, working from blueprints or templates and using scribe and handtools. Locates and marks reference lines, such as center, buttock, and frame lines. Positions parts in hull of ship, assisted by RIGGER (ship-boat mfg.). Aligns parts in relation to each other, using jacks, turnbuckles, clips, wedges, and mauls. Marks location of holes to be drilled and installs temporary fasteners to hold part in place for welding or riveting. Installs packing, gaskets, liners, and structural accessories and members, such as doors, hatches, brackets, and clips. May prepare molds and templates for fabrication of nonstandard parts. May tack weld clips and brackets in place prior to permanent welding. May roll, bend, flange, cut, and shape plates, beams, and other heavy metal parts, using shop machinery, such as plate rolls, presses, bending brakes, and joggle machines.
GOE: 05.05.06 STRENGTH: H GED: R4 M3 L2 SVP: 8 DLU: 77

Corp., 17 BRBS 17 (1985); *Yalowchuck v. General Dynamics Corp.*, 17 BRBS 13 (1985).

In traumatic injury cases, an employee's average weekly wage is determined as of the time of injury for which compensation is claimed. 33 U.S.C. § 910; *Merrill v. Todd Pac. Shipyards Corp.*, 25 BRBS 140, 149 (1991); *Sproull v. Stevedoring Servs. of America*, 25 BRBS 100, 104 (1991); *Finch v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 196, 200 (1989); *Del Vacchio v. Sun Shipbuilding & Dry Dock Co.*, 16 BRBS 190, 193 (1984); *Hastings v. Earth-Satellite Corp.*, 8 BRBS 519, 524 (1978), *aff'd in pertinent part*, 628 F.2d 85, 14 BRBS 345 (D.C. Cir.), *cert. denied*, 449 U.S. 905 (1980). Aggravation of a previous traumatic injury constitutes a new injury, which entitles the claimant to benefits based on the wages earned immediately prior to that injury. *Kooley v. Marine Indus. N.W.*, 22 BRBS 142, 146 (1989); *Del Vacchio v. Sun Shipbuilding & Dry Dock Co.*, 16 BRBS 190, 193 (1984); *Chiarella v. Bethlehem Steel Corp.*, 13 BRBS 91 (1981). Unlike §§ 12 and 13, § 10 does not contain an awareness provision for traumatic injuries. Accordingly, the time of injury is not synonymous with the date the claimant discovered the injury. *Merrill v. Todd Pac. Shipyards Corp.*, 25 BRBS 140, 149 (1991); *Matthews v. Jeffboat, Inc.*, 18 BRBS 185, 190 (1986). *Contra Johnson v. Director, OWCP*, 911 F.2d 247, 24 BRBS 3 (CRT) (9th Cir. 1990), *cert. denied*, 449 U.S. 959 (1991) (*see* discussion, infra).

Claimant argues that the average weekly wage should be assessed at the wage that Claimant was earning when he was laid off from being a shipfitter for Employer, as it is the wage just before layoff and nearer to the period of temporary total disability as confirmed by operating neurosurgeon, Dr. Kotzen. (Claimant's brief at 13.) Claimant argues that both the Ninth and the Fifth Circuits support this manifestation theory approach. See *Bourgeios v. Avondale Shipyards, Inc*., 121 F.3d 219 (5th Cir. 1997); *Johnson v. Director*, OWCP 911 F.2d 247 (9th Cir 1990).

Claimant is mistaken about the view of the Fifth Circuit. In *LeBlanc v. Cooper/T. Smith Stevedoring*, 130 F.3d 157, 161 (5th Cir. 1997), the Fifth Circuit stated that the plain meaning of § 910 is that the time of the injury means the time of the event causing the injury. The Court stated, "We will not read a 'time of manifestation' exception into the LHWCA absent some affirmative guidance from Congress on that matter." The Court goes on to state that Congress obviously intended to limit the application of the "manifestation theory" to occupational disease cases by adopting § 910(i), thereby precluding its applicability to traumatic injury cases. *Id*.

In fact, the Fifth Circuit even explains that the decision in *Bourgeois*, which was cited by Claimant as support of his proposition, was not inconsistent with the holding in the above cited case. In *Bourgeois*, the ALJ applied the manifestation theory and calculated the claimant's compensation as of the time of disability. *Bourgeois*, 121 F.3d at 220. However, as noted by the Court, the employer in *Bourgeois*, "had already conceded this point." *Le Blanc*, 130 F.3d at 161, *Bourgeios*, 121 F.3d at 221.

The facts of *Bourgeois* can be distinguished from the case at hand. Where the Employer in *Bourgeois* conceded that the average weekly wage should be determined as of the date of the disability, in this case, the Employer concedes no such thing. Employer contends that the time of the

injury should be the time of the event causing the injury.

As for the position of the Ninth Circuit, the Benefits Review Board stated that the holding in Johnson should be applied very narrowly. *Merrill v. Todd Shipyards Corp*., 25 BRBS 140 (1991). If the Claimant's condition was the natural and unavoidable result of only one injury, *Johnson* applies. If it was the result of a subsequent aggravation, constituting a new injury, the average weekly wage should be calculated as of the time of that injury. *Id*.

In addition, in *McKnight v. Carolina Shopping Company*, 32 BRBS 251 (1998), the Benefits Review Board stated that they had throughly discussed the conflicting law in the circuits regarding the time period during which average weekly wage is to be calculated in the case of a latent disability due to traumatic injury and found that the law espoused by the United States Court of Appeals for the Second and Fifth Circuits, which states that, in latent disability cases, benefits are to be based on the average weekly wage at the time of the accident which caused the injury, better applies the language of § 10 of the Act. Id at 252, citing *LeBlanc*, 130 F.3d at 157: *Director, OWCP v. General Dynamics Corp [Morales]*, 769 F.2d 66 (2d Cir 1985).) The Board states specifically that, "Inasmuch as this case does not arise in the Ninth Circuit, the Board is not bound by the holding in *Johnson*..." Id at 253.

The case at hand, also, does not arise in the Ninth Circuit. Therefore, the average weekly wage will be based on Claimant's average weekly wage at the time of the second injury accident in 1984. The parties stipulated at the hearing that Claimant's average weekly wage at the time of the 1984 injury was $571.88. (TR at 17.) This yields a compensation rate of $381.26.

In conclusion, Employer stipulated that Claimant established his prima facie case at the hearing. Employer failed to rebut the presumption with substantial evidence severing the connection between the accidents and the harm. Claimant established that he was temporarily totally disabled from May 7, 1999 until December 3, 1999, after which, Claimant suffers no physical or mental impairments.

ORDER

Accordingly, it is hereby ordered that:

1. Employer, Norfolk Shipbuilding & Dry Dock Corporation, shall pay to Claimant, James M. Kephart, $400.00 for medical expenses incurred by and/or at the direction of Bernard H. Miller, and/or by and/or at the direction of Dr. R. Kotzen, and/or for any and all medical expenses incurred prior to December 13, 2000;

2. Employer shall remain responsible for future medical treatment as provided for by the provisions of § 7 of the Act and all regulations pertaining thereto;

3. Employer shall pay to Claimant temporary total disability from May 17, 1999 through December 3, 1999, at a compensation rate of $381.26, based upon an average weekly

wage in the amount of $571.88;

4. Interest at the rate specified in 28 U.S.C. § 1961 when this Decision and Order is filed with the Office of the District Director shall be paid on all accrued benefits computed from the date each payment was originally due to be paid. *See Grant v. Portland Stevedoring Co.,* 16 BRBS 267 (1984); and

5. Claimant's attorney, within 20 days of receipt of this order, shall submit a fully documented fee application, a copy of which shall be sent to opposing counsel, who shall then have ten (10) days to respond with objections thereto.

A
RICHARD E. HUDDLESTON
Administrative Law Judge